

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Filed
By 11-8-04
Clerk, U. S. District Court
Western District of Texas
Deputy

JUAN ACOSTA, et al.,
Plaintiffs,

VS.

THE COUNTY OF EL PASO, TEXAS
Defendant.

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CAUSE NO. EP-02-CA-0564-FM

PLAINTIFFS' FIFTH AMENDED ORIGINAL PETITION

Jurisdiction

1. On November 25, 2002, Plaintiffs filed suit against Defendant for breach of contract and alternatively for violation of the Federal Labor Standards Act in the 34th Judicial District Court of the County of El Paso, Texas.

2. Defendant filed its notice of removal on December 13, 2002.

3. Jurisdiction is conferred upon this Court by the Fair Labor Standards Act of 1938, 29 U.S.C. §201 et law seq. (hereinafter the FLSA) and state and federal concurrent jurisdiction.

4. Plaintiffs' claims involve the application of state and federal laws under concurrent jurisdiction doctrines. The Plaintiffs have stated claims herein for breach of contract and an action arising under the FLSA, 28 U.S.C. §1331 and 29 U.S.C. §216(b).

5. This claim was presented to the County Judge of El Paso County and the Commissioner's Court on or about November 7, 2002 and supplemented on November 8, 2002. The notices complied with Section 89.004 of the Texas Local Government Code by presenting the claims to the County before filing suit. The notices specifically gave the County 10 days in which to contact the Plaintiffs' counsel and/or accept or reject the claim. The County has responded to said

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notices and has failed to indicate intent to negotiate or settle claims. In order to adequately preserve the claims of the Plaintiffs, the suit was filed on November 21, 2002 as notified.

II.

Parties

6. Plaintiffs are, or were, Detention Officers (“DOs”) presently, or formerly, employed by Defendant, the County of El Paso, and are employees as defined in §3(2)(C) of the FLSA, 29 U.S.C. §203(2)(C). This Amended Petition is filed for the purpose of clarifying the causes of action asserted and for revising the list of Plaintiffs. Please see Exhibit A for a complete and current list of the names of all Plaintiffs who have signed and properly filed their FLSA consents.

7. Defendant, El Paso County, is a duly constituted and authorized county in the State of Texas, and is subject to the jurisdiction of this Court pursuant to 28 U.S.C. §1491 and as an employer of the Plaintiffs pursuant to §3(d) of the FLSA, 29 U.S.C. §203(d).

8. Defendant has previously been served with process in this case and entered its appearance for all purposes. No process of service is necessary at this time. Defendant does not oppose this Plaintiffs’ Fifth Amended Original Petition

III.

Class Allegations

9. In addition to the Plaintiffs named herein, all other similarly situated persons, that is, all officers presently or formerly employed by Defendant’s Sheriff’s Department as DOs are members of the Plaintiffs’ class. This claim is maintained as a class action under and pursuant to the statutory requirements of the FLSA. 29 U.S.C. §216(b).

IV.

Breach of Contract

10. All Plaintiffs, and similarly situated persons as defined above, bring this action to recover unpaid compensation due them under the Collective Bargaining Contract between the County of El Paso and the El Paso County Sheriffs Officers Association dated October 1, 1998. Specifically, Article Eight, Section 2 states the following:

“Employees shall be paid at one and one-half times their pay for all time worked over forty (40) hours per week; and one and one-half times their basic rate of pay for all hours worked on any regular scheduled day off.”

11. The County repeatedly, systematically and knowingly failed to comply with this contractual provision in refusing to pay the Plaintiffs for pre-shift briefings and other work requirements of the Plaintiffs, including but not limited to the creation and preparation of paperwork and reports, physical training, clerical and other performed services which benefitted the County of El Paso.

12. Plaintiffs also seek attorney's fees and costs as authorized by Section 38.001 of the Texas Civil Practice and Remedies Code.

V.

FLSA

13. All Plaintiffs and similarly situated persons as defined above, bring this action to recover unpaid compensation due them under §7 of the FLSA, and an additional equal amount as liquidated damages. Plaintiffs also seek attorney's fees and costs as authorized by the FLSA. Plaintiffs have satisfied all prerequisites to suit, including but not limited to all applicable notice provisions, if any. Written consents of each of the named Plaintiffs, as required by 29 U.S.C. §216(b), previously were attached to the Original Complaint, or to subsequent Complaints filed in this matter.

14. At all times hereinafter mentioned, the Defendant employed and continues to employ a substantial number of employees in the El Paso County Sheriff's office in El Paso, Texas. At all times relevant to this lawsuit the Defendant and its employees, including the Plaintiffs, have been and remain engaged in commerce within the meaning of §3(b) of the FLSA, 29 U.S.C. §203(b).

15. Defendant is at present, and was at all times hereinafter mentioned, engaged in the performance of related activities through unified operation or common control for a common business purpose and is an enterprise within the meaning of §3(r) of the FLSA, 29 U.S.C. §203(r). At all times relevant to this lawsuit, Defendant has had many employees engaged in commerce and has been and remains an establishment of an enterprise engaged in commerce within the meaning of § 3(s)(6) of the FLSA, 29 U.S.C. §203(s).

16. Defendant is, and at all times material hereto was, a public agency within the meaning of § 3(x) of the FLSA, 29 U.S.C. §203(x).

17. Defendant has repeatedly and willfully violated, and continues to willfully violate §6 and §7 of the FLSA by failing and having failed to pay Plaintiffs and other similarly situated employees, or former employees, for the hours worked by such employees in excess of forty (40) hours per week at a rate not less than one and one-half times the regular hourly rate at which such employees were compensated and by failing to pay Plaintiffs straight time for certain hours subsumed within the forty (40) hour work week. 29 U.S.C. §§206, 207.

18. Defendant has repeatedly and willfully violated, and continues to willfully violate the FLSA in each of the following ways: Failing to pay Plaintiffs straight time and/or overtime for time worked by them in pre-shift briefings and in other pre-shift activities; Failing to pay Plaintiffs straight time and/or overtime for time worked by them in post-shift briefings and in other post-shift activities; Failing to pay Plaintiffs straight time and/or overtime for time worked by them in physical

fitness training during off duty time to maintain the required standards for the SRT and for Physical Testing; Failing to pay Plaintiffs straight time and/or overtime for time worked by them on guard duty while supervising trustees during meal breaks; Failing to pay Plaintiffs straight time and/or overtime for time worked by them in the cleaning and maintenance of weapons and in weapons training during off duty time; Failing to pay Plaintiffs straight time and/or overtime for time worked by them while engaged in training in the Academy; Failing to pay Plaintiffs straight time and/or overtime for other time worked by them without compensation while “off the clock”; and other violations of the FLSA to be determined during the course of discovery in this matter. These violations of FLSA have been ongoing for at least three years prior to the filing of the Original Complaint and are continuing up to the present time. These violations are widespread and involve DOs at both the downtown and annex locations of the County Detention Center.

VI.

Damages

19. Plaintiffs have suffered and continue to suffer damages as a result of the Defendant’s failure and refusal to pay proper compensation, as shown above, in an amount which is uncertain and presently increasing because of the Defendant’s continued violations of the FLSA. Plaintiffs are entitled to a judgment granting them damages in the amount of the difference between the partial wages actually received by the Plaintiffs and the full wages they are entitled to recover under law, including all uncompensated overtime wages and straight pay for hours worked in regular duties as required by the FLSA, together with an additional equal amount as liquidated damages as specifically authorized by §16(b) of the FLSA, 29 U.S.C. §216(b).

VII.

Attorney’s Fees

20. Plaintiffs are also entitled to a recovery of reasonable attorney's fees and costs as specifically authorized by Texas state law for the breach of contract claims and §16(b) of the FLSA, as well as pre- and post-judgment interest herein. 29 U.S.C. §216(b).

VIII.

Trial by Jury

Plaintiffs hereby demand a trial by jury.

WHEREFORE, cause having been shown, Plaintiffs pray judgment be granted:

- (1) Finding that the Defendant has willfully and knowingly breached the Collective Bargaining Contract as set forth herein;
- (2) Finding that the Defendant has willfully and knowingly violated the federal FLSA and wage and hour laws;
- (3) Ordering the Defendant to pay the Plaintiffs and all other similarly situated employees unpaid compensation found due by the Court as a result of the Defendant's violations of the Collective Bargaining Contract dated October 1, 1998 and of the FLSA together with pre- and post-judgment interest thereon and an additional equal amount as liquidated damages;
- (4) Ordering the Defendant to pay Plaintiffs' reasonable costs in this action;
- (5) Ordering the Defendant to pay reasonable attorney's fees; and,
- (6) Ordering the Defendant to pay pre- and post judgment interest;
- (7) Providing such further relief as is just and necessary.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I, MARJORIE WILCOX JOBE, do hereby certify that on this 4th day of November, 2004 a true and correct copy of the foregoing document has been delivered to Mr. Ralph E. Girvin Jr., Assistant County Attorney, El Paso County Attorney's Office, El Paso County Courthouse, 500 E. San Antonio, Room 503, El Paso, Texas 79901 via facsimile transmittal to 546-2133 and/or regular postal delivery and to Ms. Christine Pacheco, Legal Advisor to Sheriff, Leo Samaniego, 800 E. Overland, 3rd Floor, El Paso, Texas via facsimile transmittal to 546-2028 and/or regular postal delivery.



MARJORIE WILCOX JOBE

“EXHIBIT A”

Juan Acosta
Rene Aguilar
Peter A. Alba
Frank Alegre
Oscar Almazan
Jimmy Almonte
Carlos Alvarado, Jr.
Robert Alvarado
Osvaldo Alvarez
Francisco Ambriz
David Amparan
Raymond C. Ancheta
Carlos Andrade
Juan D. Archuleta
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George D. Arroniz
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Christopher Barlow
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Wenford Brown
Carl Bryant
Gerardo Cabral
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Rogelio Carmona
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Abel Carreon
Jesus Carreon
Lorena Carreon
Rogelio Carreon
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Gabriel Castillo
Yvette Castillo
John D. Castro
Raul Castro
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Omar Chavarria
Eduardo Chavez
Jesus Chavez
Jose G. Chavez
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Victor M. Chavez
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Mario A. Correa
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Sergio Cruz
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Daniel A. Dicken
Alan M. Dickerson
Maximo Dominguez
Raul Dorado
William Dotson
Sergio Echavarria
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 Armando Gomez, Jr.
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 Edgar Hernandez
 Laura Hernandez
 Leticia Hernandez
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 Eduardo Nava Herrera
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 Paul Martinez
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